Office-Supreme Court, U.S.
FILED
JUN 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1967~~ 195

CHEMICAL NATURAL RESOURCES, INC., VENEZUELAN SULPHUR CORPORATION, C. A., HON. BYRON A. MILNER, PRESIDENT JUDGE AND HON. DAVID L. ULLMAN, JUDGE, OF COURT OF COMMON PLEAS NO. 3 OF PHILADELPHIA COUNTY,

Petitioners,

v.

REPUBLIC OF VENEZUELA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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OCTOBER TERM, 1965.

No.

CHEMICAL NATURAL RESOURCES, INC., VENEZUELAN SULPHUR CORPORATION, C. A., HON. BYRON A. MILNER, PRESIDENT JUDGE, AND HON. DAVID L. ULLMAN, JUDGE, OF COURT OF COMMON PLEAS NO. 3 OF PHILADELPHIA COUNTY,

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REPUBLIC OF VENEZUELA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Chemical Natural Resources, Inc., Venezuelan Sulphur Corporation, C. A., Hon. Byron A. Milner, President Judge, and Hon. David L. Ullman, Judge, of Court of Common Pleas No. 3 of Philadelphia County, re-

spectfully pray that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Pennsylvania, entered in the above matter on January 4, 1966.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Common Pleas No. 3 of Philadelphia County, printed as Appendix C hereto (*infra*, pp. 9a-32a), is reported at 38 Pa. District & County Reports, 2d series, 47, et seq. The opinion of the Supreme Court of Pennsylvania, the concurring opinion, the concurring and dissenting opinion, and the two dissenting opinions, printed as Appendix D hereto (*infra*, pp. 33a-87a), are reported at 420 Pa. 134, et seq.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on January 4, 1966 (Appendix E, page 88a, *infra*) On March 10, 1966, Mr. Justice William J. Brennan, Jr., entered an order extending time for filing a petition for writ of certiorari herein to and including June 3, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257.

STATEMENT OF QUESTIONS INVOLVED.

1. Does the State Department have jurisdiction to determine the sovereign immunity of a foreign government *as a matter of law* in a suit by American citizens to recover fair compensation for property expropriated by the foreign government; and, once such a *legal* determination is made, are the courts conclusively bound and foreclosed from any inquiry into such *legal* determination?

2. Where the State Department officially proclaims a change in policy from the classic to the restrictive theory of sovereign immunity, and American citizens, pursuant to the urgings of the United States Government, make substantial investments in a foreign country, which are subsequently expropriated without compensation, should the courts, in a suit by American citizens for fair compensation, honor a plea of sovereign immunity by the State Department on behalf of the foreign government in violation of its announced policy, without changing its policy, without showing any circumstances justifying a departure from its announced policy, and in conflict with the Congressional policy as expressed in its various enactments, and with the decision of this Court holding that the restrictive theory of sovereign immunity is the applicable policy of the United States Government (*National City Bank v. Republic of China*, 348 U. S. 356), and with international law, which prohibits expropriation without fair and prompt compensation?

STATUTE AND DECLARATION OF EXECUTIVE POLICY INVOLVED.

The executive policy involved is embodied in the letter by Department of State's Acting Legal Advisor, Jack B. Tate, to Acting Attorney General Philip B. Perlman, dated May 19, 1952, 26 Dept. of State Bull. 984, 1960 A. M. C. 898. It is printed in Appendix A, *infra*, pp. 1a-5a.

The statute involved is the Foreign Assistance Act of October 7, 1964, P. L. 88-633, Sec. 620(e), 22 U. S. C. A. 2370(e).

STATEMENT OF THE CASE.

Chemical Natural Resources, Inc., a Delaware corporation (hereinafter referred to as "Chemical"), brought this action to recover fair compensation for its property expropriated by respondent, Republic of Venezuela. The trial court denied a plea of sovereign immunity, but the Supreme Court of Pennsylvania, in a divided decision, reversed, and held that the mere filing of the plea by the Department of State foreclosed any consideration or inquiry into the action of the State Department, and granted a writ of prohibition against the trial judges, directing dismissal of the case.

Chemical purchased certain mineral concessions in Venezuela in 1952, and, in the course of its operations, located and brought to the surface a vein of geothermal steam. At great expense and effort, Chemical, urged and encouraged by the Republic of Venezuela, proceeded with arrangements for the construction of a power plant and the purchase of equipment, for which Chemical obligated itself to pay $25,000,000.00. Contracts were entered into with the Venezuelan Government for the sale of the power to be produced. Suddenly, and without any notice, the Venezuelan Government, on August 29, 1959, nationalized and expropriated the geothermal steam. Venezuela, however, kept negotiations open to induce Chemical to complete the construction and put the plant in operation. On September 7, 1959, Venezuela unilaterally cancelled the existing contracts, but again kept negotiations open. On May 27, 1961, a new contract was entered into whereby Chemical agreed to complete the installations and to operate the power plant for a term of twenty-five years, with profits to be divided equally between Chemical and Venezuela, upon condition that the entire installation would become the property of Venezuela at the expiration of the twenty-five year period. In September of 1962, however, Venezuela breached its latest agreement and delivered an ultimatum, rescinding all prior agreements and requiring Chemical to complete the plant

and sell the power to Venezuela at a rate which would result in great financial loss to Chemical.[1] This confiscatory ultimatum effectively terminated Chemical's interest in the project. It had not only lost its property by the expropriation, but its contract rights had now also been completely wiped out—all without any compensation whatever.

Chemical attempted to negotiate directly in Venezuela for compensation for its losses, but could not even obtain an audience with any Venezuelan representative to discuss it. Chemical then appealed to the United States Department of State to intercede in its behalf. Thereafter, the State Department, for more than one year, sought to bring the parties together, but the Venezuelan Government flatly refused to come to the conference table or to authorize any representative to enter into any discussions. Despite its best efforts, the United States State Department was unable to arrange for a single meeting with Venezuela, either in Venezuela or in the United States, during this entire period of more than one year.

Left with no alternative, Chemical instituted this suit on October 21, 1963, and effected service by foreign attachment of one of Venezuela's nationalized commercial vessels. Venezuela then appealed to the State Department to intercede in its behalf. An arrangement was then worked out whereby Chemical released the vessel and dissolved the attachment, but kept the suit alive upon the express understanding that Venezuela would enter into settlement discussions, and, if no adjustment could be worked out, then the law suit would continue. After dissolution of the attachment, however, Venezuela again breached its agreement to negotiate and refused to enter into settlement discussions. Instead, Venezuela requested the State Department to file a plea of sovereign immunity in its behalf. The State Department thereupon indulged in a unique and extraordinary procedure. It scheduled a hearing to deter-

1. The 1959 agreement provided a rate of six centimos per kilowatt hour up to 30,000,000 and three centimos in excess of that. The confiscatory ultimatum called for one cent per kilowatt hour.

mine whether, *as a matter of law,* Venezuela was entitled to sovereign immunity. At the hearing, the Legal Advisor to the Secretary of State sat as a presiding judge, and held, *as a matter of law,* that Venezuela was entitled to immunity from suit, and arranged for the filing of the plea of sovereign immunity by the State Department on behalf of Venezuela. The State Department's *legal* decision was entered into the record below, along with the plea of sovereign immunity.

The matter was heard twice in the trial court, the second time by two judges sitting as the court en banc.[2] The court en banc rendered its decision on December 18, 1964, denying the plea of sovereign immunity on the authority of this Court's opinion in *National City Bank v. Republic of China,* 348 U. S. 356, 99 L. Ed. 389 (1955), the Tate Letter, 26 Dept. of State Bull. 984 (1952), and the national policy set out in the Foreign Assistance Act of 1964, 22 U. S. C. A. 2370; 38 Pa. D. & C. 2d 47, et seq.

Respondent appealed to the Pennsylvania Supreme Court from said order, and also filed a petition for a writ of prohibition or mandamus against the Judges of the trial court, that they be directed to dismiss the action because of the plea of sovereign immunity, 420 Pa. at 141. The Pennsylvania Supreme Court, in a divided decision, with three of the seven Judges dissenting, dismissed the appeal, but granted a writ of prohibition ordering the two Judges in the trial court to dismiss the action, holding that the decision of the Department of State accepting Venezuela's plea of sovereign immunity is conclusive and binding upon the judiciary, which is without power to re-

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2. At this hearing, the State Department representative, completely unaware of the prior history, sharply criticized Chemical for not bringing the matter to the attention of the State Department, stating that had it done so, adequate compensation could have been worked out. In point of fact, Chemical and its representatives were almost constantly in the State Department conferring with the high echelon who sympathetically tried to bring the parties together, but Venezuela snubbed and ignored all efforts in that direction.

view it (420 Pa. 134, 137, 161); that the Tate Letter may arbitrarily be "silently abandoned" by the State Department (420 Pa. at 159).

Mr. Justice Musmanno dissented, stating that the majority opinion erroneously deprives the Judiciary of its proper jurisdiction to review an executive *legal* decision concerning sovereign immunity which, as this Court has held, was itself a creature of the Judiciary; that the State Department's broad application of the doctrine of sovereign immunity conflicts with its own published policy of restrictive application of this privilege, and illegally deprives American citizens of property without due process of law and protects the illegal foreign expropriation of property without payment. 420 Pa. 170-195.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I. The Principle of Sovereign Immunity Is a Judicially-Created Doctrine, Which May Be Withdrawn or Modified Only by the Judiciary. The Department of State, Under Its Function to Fix Foreign Policy, May Not Invade the Judicial Function and Determine the Legal Issues Involved. The Vital Part of the Decision of the Court Below, Holding the Judiciary to Be Foreclosed From Reviewing the Executive's Decision Regarding the Legal Issues Is in Conflict With the Decision of This Court in *National City Bank v. Republic of China*, 348 U. S. 356.

This Court, in *National City Bank v. Republic of China*, 348 U. S. 356, 99 L. Ed. 389 (1955), in tracing the history and the development of the doctrine of sovereign immunity, made it clear that the doctrine emanated from the Judicial and not the Executive Branch of the Government. This Court said that:

> "The freedom of a foreign sovereign from being hauled into court as a defendant has impressive title-deeds. Very early in our history this immunity was recognized, DeMoitez v. The South Carolina, F. Cas. No. 9697, Bee 422 (Admiralty Court of Pa. 1781, Francis Hopkinson, J.), and it has since become part of the fabric of our law. *It has become such solely through adjudications of this Court.* Unlike the special position accorded our States as party defendants by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court. To be sure, the non-suability of the United States without its consent is likewise derived from considerations of policy. But these are of a different order from those that give a foreign nation such immunity." (U. S. at 358-59, L. Ed. at 395-96) (Emphasis supplied.)

Since the doctrine of sovereign immunity was fashioned by the Judiciary, it is that branch of the government only which may modify or withdraw it, and must, under its inherent powers, finally decide all legal issues arising therefrom. Under our Constitutional form of government, the right to fix foreign policy does not carry with it the right to resolve the legal issues involved in its application. The legal issues involved in international law are no less subject to this practice than those arising from domestic affairs. In *The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320 (1900), this Court held:

> "International law is part of our law, and must be ascertained and administered *by the courts of justice of appropriate jurisdiction* as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves pecularily well acquainted with the subject of which they treat. *Such works are resorted to by judicial tribunals,* not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." (U.S. at 700, L. Ed. at 323-324) (Emphasis supplied.)

More specifically, this Court has made it clear that the existence of a question involving foreign relations does *not* put the matter beyond judicial cognizance. Thus, in *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380, 93 L. Ed. 76, 82 (1948), this Court held that while the Executive branch will itself determine the question of sovereignty over territory, the Judiciary will then decide the legal principles to be attached to that status as well as the applicability of statutes thereto.

This, of course, becomes especially true where the history of the doctrine involved demonstrates, as here, that it was judicial in its inception, and where, as here, too, the application of the principle will have a significant effect upon rights affected by the litigation.

In this case, the Department of State did, in fact, fix foreign policy involving sovereign immunity by an express declaration known as the Tate Letter, 26 Dept. of State Bull. 984 (1952).[3] Upon the event that the application of the policy, as fixed by the State Department, interfered with the rights of private citizens, legal issues which arose could only be resolved by the Judiciary, as in the case of *any* legal question. However, after petitioner had instituted the instant suit, the State Department itself undertook the role of a judicial tribunal and held a hearing for the express purpose of resolving, *as a matter of law,* whether Venezuela's plea of sovereign immunity should be allowed. After hearing argument and considering the legal briefs filed, the Legal Advisor, sitting in judgment, determined that "in the light of the legal issues", the plea should be allowed (p. 89a). That this constituted an invasion of the judicial function seems clear beyond doubt. As stated in *The Paquete Habana, supra,* the Court may not blindly accept, as did the Court below, the legal conclusions, indeed, not even the factual allegations expressed by the State Department, but must determine the legal and factual basis for the conclusion, as in any judicial proceeding. In conformity with that rule of this Court, the Second Circuit, in the *Katingo Hadjipatera,* 119 F. 2d 1022 (1941), where the Attorney General filed a suggestion of sovereign immunity, did not just drop everything and dismiss the case, but received evidence upon the very issue of justification of the plea and concluded as a matter of law that the suggestion should be overruled.

In this connection, the Restatement, Foreign Relations Law of the United States (1965), § 72, provides that a

3. This is discussed more fully *infra.*

suggestion of sovereign immunity from the executive branch of the United States is conclusive *only* as to issues determined by the executive "within the exclusive constitutional competence of the executive branch of government and as to other issues directly affecting the conduct of foreign relations." Comment "a" thereunder states that "the extent to which courts will give weight to a suggestion of immunity by the executive . . . depends upon the basis upon which such immunity is suggested. . . . It is not conclusiye as to an issue of law or fact of a type normally determined by courts in litigation not involving foreign relations, even though in a particular case it may have an effect on the conduct of foreign relations."

The decision of the Court below introduces a new and disturbing element in connection with the jurisdiction and authority of the Department of State. Under the lower court's holding, the courts are barred from inquiring into any conclusion of the Department of State, and upon the entry of the Secretary of State into the picture, the courts must immediately withdraw and accept his determinations. That this is destructive of the system of checks and balances and of the constitutional division of authority among the three branches of government is self-evident. This decision would render the Judiciary a mere ministerial body, and the Executive, under the guise of foreign policy, could circumvent the Constitution, the Congress and the Judiciary. So broad and sweeping is the decision of the Court below, it is at war with the decisions of this Court in the *Republic of China* and *Paquete Habana* cases, which made clear that it is the Judiciary which has the responsibility to determine the legal issues, a responsibility which may not be surrendered or abdicated. Certiorari should be granted upon this ground alone, to settle this jurisdictional question between the Executive and Judicial branches of the Government.

II. When the State Department Officially Proclaimed Its Restrictive Theory of Sovereign Immunity, and American Citizens, Pursuant to Governmental Urging, Make Investments in Foreign Countries Which Were Subsequently Expropriated, the State Department May Not, Without a Formal Change in Policy, Prejudice the Rights of the Citizens by Granting Immunity From Suit to a Foreign Government, in Violation of Its Own Official Policy, of International Law, of the Congressional Mandates Limiting the Application of the Immunity Doctrine, and of the Decision of This Court in the *Republic of China* case, Recognizing the Restrictive Theory of Sovereign Immunity.

In line with the achievement of simple justice, our own Government early started to re-evaluate its own protection and sovereign immunities. Thus, there have followed in quick succession the creation of the Court of Claims, the Federal Tort Claims Act,[4] the Suits in Admiralty Act,[5] and the Public Vessels Act,[6] systematically stripping the United States of its own erstwhile immunity from responsibility for its acts and rendering it liable in the same manner as any private individual.

Eventually, as this nation developed to hemispheric and world-wide proportions, and our citizens became increasingly subject to unreasonable attrition and breaches of international law by foreign sovereigns, our courts and our Government became increasingly aware that the American brand of even-handed justice does not enjoy international acceptance. Our citizens seeking simple justice in foreign courts were repeatedly seen to be deprived of rights and property behind a curtain of unrelenting immunity. It became only reasonable, therefore, that this inequitable

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4. 28 U. S. C. A. 2671, et seq.
5. 46 U. S. C. A. 741, et seq.
6. 46 U. S. C. A. 781, et seq.

insulation from justice should be steadily eroded in our own courts to assure to our citizens a forum for their rights. The result has been a wholly revised and narrowed view of the doctrine of sovereign immunity—placing foreign governments in no better position in our courts than that of the United States Government.

Thus, in 1952, the Department of State made its first great departure from this onerous doctrine, by the formal, expressed change in policy concerning its own pleas for immunity on behalf of foreign sovereigns by a proclamation entered in the form of the so-called Tate Letter.[7] In the Letter of Acting Legal Advisor Jack B. Tate to the Attorney General, the Department formally adopted the restrictive doctrine: that immunity is recognized with regard to sovereign or public acts of a state, *but not with respect to private acts.* It further expresses the view that the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the United States in subjecting itself to suit in these same courts for both contract and tort claims. The State Department concludes that due to the widespread and increasing practice on the part of governments of engaging in commercial activities, *it is necessary to enable persons doing business with them to have their rights determined in court. Therefore, the Letter concluded:*

> "It will hereafter be the Department's policy to follow the restrictive theory of foreign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."[8]

The Tate Letter, as an official bulletin of the State Department, whereby it enacts a policy which affects or

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7. Dept. of State Bull., Vol. 26, p. 984 (Appendix A, *infra*).

8. The Tate Letter also stated that the doctrine of sovereign immunity should not be claimed or granted in actions with respect to real property. The present matter, involving minerals being removed from the earth, falls within this aspect of the principle also.

determines rights, must be given the effect of law until formally amended or rescinded by the Department. *Columbia Broadcasting System v. United States,* 316 U. S. 407, 422, 86 L. Ed. 1563, 1573 (1942); *Maryland Casualty Co. v. United States,* 251 U. S. 342, 349, 64 L. Ed. 297, 302 (1920). This has not taken place.[9]

In accordance with the current doctrine, it has been the policy of the State Department to inform foreign nations that immunity will be suggested to the court *only in accordance with the restrictive doctrine.* Such adherence to the restrictive doctrine represents a decision by the Department that with *regard to jurisdiction, the absolute doctrine is no longer binding as a matter of international law,* and that as a matter of policy, "the wide spread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the Courts." This rationale of the restrictive doctrine had been previously expressed by Secretary Lansing in a letter of November 8, 1918, to the Attorney General, wherein he stated that when a sovereign enters into business, he submits himself as does a private individual to the responsibilities of such business. Issues arising therefrom, he said, *are more readily determinable by the courts than by the political departments of the Executive Department.* Hackworth, Digest of International Law, Vol. 2, pp. 429-430 (1941).

This Court, along with the Department of State, equally recognizing the injustice of broad governmental immunity,

9. The State Department could not act contrary to the provisions of the Tate Letter without committing a breach of due process. The Tate Letter has never been effectively rescinded. To effectively rescind an administrative order, notice of such rescission must be made known to the public. The Administrative Procedure Act, § 4, provides for the required publication or service of any substantive rule. Without stating at any time that the Tate Letter is no longer to be given effect, the Department of State's actions must be in conformity with the Tate Letter, and a suggestion of immunity could not legally issue to the detriment of Chemical Natural Resources, Inc.

has unequivocally declared its reversal of its own past declarations on the subject, and has restricted sovereign immunity to the narrowest limits. In *National City Bank v. Republic of China*, 348 U. S. 356, 99 L. Ed. 389 (1955), Mr. Justice Frankfurter, speaking for the Court, after noting that even the immunity enjoyed by the United States "has not been favored by the test of time" and was found to conflict with "the moral judgment", pointed out the "reflection of this steady shift in attitude" in the prior opinions of this Court.[10] The same shift was seen reflected in the Congressional steps taken to satisfy "this chilly feeling against sovereign immunity", as exemplified by the Court of Claims Act, *supra* (U. S. at 359-60, L. Ed. at 396). Mr. Justice Frankfurter continued:

> "The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in law-making by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. See James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934), pp. 213 et seq.; Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 13-16.
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> ". . . Recently, the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952), despite the fact that this Court thirty years earlier rejected the weighty opinion of Judge Mack in The Pesaro, (D. C.

10. Citing *Davis v. Pringle*, 268 U. S. 315, 318, 69 L. ed. 974, 978; *White v. Mechanics Secur. Corp.*, 269 U. S. 283, 301, 70 L. ed. 275, 279; and *Keifer v. R. F. C.*, 306 U. S. 381, 391, 83 L. ed. 784, 789.

N. Y.) 277 F. 473 (see, also, his opinion in The Gloria, 286 F. 188), for differentiating between commercial and war vessels of governments. Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562, 70 L. ed. 1088, 46 S. Ct. 611." (U. S. at 360-61, L. ed. at 396-97)

This Court, accepting the Tate Letter, recognized that it was a change in policy directly in conflict with its own earlier decisions relied upon by the court below. Thus, this Court recognized that the Department of State had finally come around to the changed policy, above discussed, which had been developing in its own decisions over the years.

This Court decreed that "sovereign immunity" is *not* an absolute right, running concurrently with sovereignty, but is a limited defense, which depends for its application upon the existence of "fair play" and the presence of due process (348 U. S. at 364). The situation had become intolerable in that foreign governments were enjoying an immunity which the United States Government itself did not enjoy—an immunity which insulated foreign governments from all their legal and moral obligations. This unconscionable situation is no longer the law of the United States, nor the policy of our Government.

It is now clear that this Court will make a distinction between governmental and proprietary activities of a foreign government defendant, and that sovereign immunity will be applicable only in the case of the former.

The Court below relies upon *Ex parte Republic of Peru*, 318 U. S. 578, 87 L. Ed. 1014 (1943), which, while it may be distinguished on its own facts,[11] nevertheless has completely

11. In the *Peru* case, this Court sustained the immunity because there was "seizure and detention of property of a foreign sovereign", which would embarrass our foreign relations. The present case does *not* involve such retention, the vessel herein having been released at the outset. Further, a distinction has been made between a suit to obtain a decision on the *merits* of a claim, as here, and action to execute upon the foreign property in *satisfaction* of a judgment. *Weilamann v. Chase Manhattan Bank*, 21 Misc. (N. Y.) 2d 1086, 192 N. Y. S. 2d 469, 472 (1959). The instant case requests only the legal determination, not satisfaction, of appellants' claim.

lost its vitality and has been specifically modified, if not superseded, by the *Republic of China* case, and the Tate Letter. In *Republic of China,* in "more immediately touching the evolution of legal doctrines regarding a foreign sovereign's immunity", as exemplified by the Tate Letter, this Court emphasized, in now accepting the new restrictive policy, that it had, some years earlier, specifically rejected the same doctrine in *Berizzi Bros. v. The Pesaro,*[12] upon which the *Republic of Peru* doctrine relied. In thus changing its prior position and now adopting the once-rejected holding of Judge Mack, as cited above, this Court reversed its position in *The Pesaro,* and, with this, the *Peru* case fell.

The court also cited *Rich v. Naviera Vacuba, S. A.,* 295 F. 2d 24 (4th Cir. 1961), but overlooked the basic and distinguishing features of that case. Significantly, *there the plaintiff was permitted to sue and obtain a judgment against the Cuban Government* (which is all that petitioner seeks to do here). It was only when the claimant there sought execution upon the judgment and attached a Cuban vessel which had defected, and the President, acting under emergency circumstances, filed a plea of sovereign immunity, that the court found the plea of sovereign immunity to be justified. Especially significant is the fact that during that period the Cuban Government threatened to hijack Eastern Airliners then flying to Cuba, unless the vessel was released. Under these circumstances, the State Department's plea of sovereign immunity could be fully justified as a proper exercise of its foreign policy. In this respect, it was sustained by the Court. The lower court was clearly in error in relying upon that decision. Here, the State Department filed the plea as a *legal* matter—not policy—and there are no extenuating circumstances nor are any other circumstances suggested.

More recently, Congress has declared its current policy by denouncing the "nationalization, expropriation or

12. 271 U. S. 562, 70 L. Ed. 1088.

seizure of property of United States citizens'' without compensation, and completely breaking down the immunity barrier, in the enactment of the Foreign Assistance Act of October 7, 1964, P. L. 88-633, Sec. 620(e), 22 U. S. C. A. 2370(e), which provided for the withholding of foreign aid to any country which has violated international law by expropriation of property owned by a United States citizen or a corporation which is not less than fifty per cent owned by United States citizens, or has ''taken steps to repudiate or nullify existing contracts'' with such citizen or corporation, and has not taken appropriate steps to compensate therefor.[13]

Further, the statute provides that foreign governments shall in our courts be treated no better than the Government of the United States is treated. In so doing, Congress legislated a complete reversal of the ancient legislative policy of sovereign infallibility. This statute provides that the ''act of state'' doctrine, the companion defense to sovereign immunity, shall be ineffective to prevent a determination on the merits of a claim based upon a taking in violation of international law.[14] The specific intent of Congress and the policy declared was that ''no effect shall be given to acts of a foreign sovereign that are found to be in violation of international law,'' [15] and that the courts may determine their own jurisdiction in the litigation involved, even in the face of an Executive suggestion of immunity.

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13. The identical provisions have also been enacted into the Inter-American Development Bank Act, P. L. 89-6, 22 U. S. C. A. 238, et seq., approved March 24, 1965.

14. The Act specifies two exceptions to its application where the act of the foreign state is not contrary to international law; and where the President determines that the act of state doctrine should be applied and a suggestion thereof is filed on his behalf. Neither proviso applies here: 1. The expropriation without payment was grossly contrary to international law (see *infra*); and 2. there is nothing to indicate that the President made any determination or that the suggestion was filed on his behalf.

15. Senate Rep. No. 1188, Cong. Record, Vol. 110 (1964); U. S. Code Cong. and Adm. News, 88th Cong., 2nd Sess. p. 5034.

There can be no doubt that the Republic of Venezuela violated international law by its expropriation without compensation and its breach of contract. It is fundamental in international law that foreign states must provide prompt and adequate compensation for the taking of alien-owned property or for the breach of any contract. After a careful review of the law, as applied by the United States and the free governments of the world, the Restatement of Foreign Relations Law of the United States (1965) stated:

> "Section 185. *When Taking is Wrongful Under international Law.*
>
> "The taking by a state of property of an alien is wrongful under International law if either
>
> "a) it is not for a public purpose;
>
> "b) there is not reasonable provision for the determination and payment of just compensation; . . ."

Thus, the Courts, the Congress, the Department of State and the recognized authorities have joined in unanimous denunciation of expropriation without compensation, and breach of contract.[16] Governments cannot avoid responsibility by simply changing their local law, and any immunity that might otherwise exist disappears upon such illegal confiscation.[17] Shattered is the distinction which up to now formed the barrier in actions against foreign governments. Today, our courts have full power to hear and decide the issue of sovereign immunity and to determine the merits of this claim against the Republic of Venezuela.

The decision of the Court below erases more than a generation of change and throws us back to the discredited theory of absolute sovereign immunity, wholly overlooking the dramatic changes which have taken place. Further, it

16. The General Assembly of the United Nations has also reaffirmed this: Operative Paragraph 4 of Resolution 1803 (XVII), adopted December 1962.

17. Restatement of Foreign Relations of the United States, (1965), Sec. 186.

would abdicate from the judicial responsibility of making its own judicial determinations and blindly accept those of the Executive branch, in contravention of the separation of powers and duties between the two.

Before instituting this action, petitioner invoked the aid of the State Department to no avail. Diplomatic efforts were completely frustrated by the refusal of the Venezuelan government even to discuss the matter with the State Department. Diplomatic channels having failed, petitioners' only recourse was to the courts. The State Department's determination, according to the trial court, would take away the only remaining remedy and hope of obtaining fair or, indeed, any compensation for the expropriation of its property.

This case must be examined by this Court so that, not only petitioner, but countless other American citizens will know what protection they have for their foreign investments. If the State Department can effectively nullify a law suit for fair compensation, then the citizenry should be fully and promptly so informed. Anything less will result in deprivation of due process and will invite more and greater frauds and inequities by foreign governments.

CONCLUSION.

In his vigorous dissent from the majority of the Court below, Mr. Justice Musmanno said:

> "Surveying and appraising what has been done by Venezuela here, it would be difficult to conjure up a more flagrant violation of the property rights of American citizens who are being urged, in the interest of the Good Neighbor Policy, to invest in Latin America. The Majority Opinion says that no matter how unjust or unfair Venezuela has been to American citizens, to the American people, or even to our judicial system, this Court is powerless to protect Americans once the State Department hints Foreign Sovereign Immunity.

• • •

"The Majority is of the opinion that once the Executive Department of our government speaks, the Judiciary Department may not question what the Executive Department has said or even inquire into the circumstances which brought about the Executive Department's utterance. Nothing in the Constitution, no expression in statutory law, no precedent in court decisions, and, needless to say, nothing in the chronicles of deliberation of our founding fathers, does or can justify so startling a proposition. The decision of this Court is even more astonishing because the very Department which this Court declares infallible has denied infallibility and has specifically announced, as a matter of official policy, that foreign sovereign immunity in commercial transactions is something not to be decided unilaterally by the State Department, but is a matter for adjudication in the Courts." 420 Pa. at 174-75.

* * *

"The Majority Opinion in this case does not answer the question which inevitably springs up: Why should this government allow to foreign governments a privilege which it does not enjoy itself? Why should Venezuela be permitted to come into our courts and claim an immunity from a contractual obligation when the United States does not exercise that privilege in its relationship with its own citizens or with foreigners?" (420 Pa. 187-88)

* * *

"The sovereign immunity doctrine, with the exception clearly spelled out in this opinion, is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of interna-

tional concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

"I believe we should affirm the action of the lower court which judiciously and courageously declined to approve of what the Venezuelan government has done, which, to speak bluntly, constitutes brigandage in violation of international law, condemned by every civilized government in the world. We have here, I cannot repeat too often or emphasize too much, the simplest business transaction and I cannot share the alarm evinced by the Majority Opinion that this litigation portends a crisis of state which conjures up even fear of a war with Venezuela. I cannot see in this dollar-and-cents commercial dealing an international extremity which should compel us to abandon primary principles of law, elementary concepts of justice, ordinary rules of logic and to turn our backs on our own citizens to enrich a nation which dispossessed American property owners, collected $380,000,000 from the pockets of American taxpayers, opposes allowing American investors a forum in which they may present their claims without apprehension or coercion and whose police condone the burning the American Flag.

"The Majority of this Court, in its final judgment, ignores the plain intendment of the decision of our highest court in the land, in the *Republic of China* case, it in effect defies a solemn act of Congress (78 Stat. 1009), 22 U. S. C. § 2370, which is practically the law in the case, and it treats casually the official pronouncement of the State Department itself in Dept. of State Bulletin, volume 26, page 984, which has never been recalled, changed or modified. For these reasons, therefore, I must dissent to what the Majority has done and

what, in the face of the dominant law, it has failed to do but should do." (420 Pa., 194-95)

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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